ARIZONA CITIZEN.

VOL. II.] TUCSON, PIMA COUNTY, A. T., SATURDAY, FEBRUARY 10, 1872. [No. 18.

RIGHTS OF THE PEOPLE.

Supreme Court Decision in What is Popularly Known as the Bichard Confiscation Case.

The United States, plaintiff and appellant vs. Certain Property. William Bichard & Co., respondent.

This proceeding was instituted July 29, 1871, by petition and information, in the District Court of the First Judicial District of Arizona, for the condemnation of certain merchandise therein described, alleged to have been forfeitable and seized as such June 20, 1871, near the reservation of the Pima and Maricopa Indians, by Capt. Frederick E. Grossman, Special Indian Agent, on a charge of illegal traffic with the said Indians.

On the 21st of October last, William Bichard & Co. were, on their petition and claim as sole owners, admitted to defend the said property against the decree of condemnation thus prayed for; and having filed their bond, with sufficient sureties, in the sum of seven thousand dollars ($7,000) which was the value of the property in controversy, as found upon appraisement, the case proceeded upon that.

The property in contest, including a barrel of whisky, was alleged in the information, to have been seized on the Indian reservation above described. This allegation, however, has since been found to have been erroneous, and been abandoned, as appears by the stipulations filed of record in the present case, which admit the conclusions of fact on which the judgment of the Court below was prayed; for it is therein stated and agreed, by the attorney for the United States, as well as by the attorney for the claimants, "that the place of business of William Bichard & Co., wherein the goods against which this action was brought were seized, was and is off the limits of the described Indian reservation, very close to the southern boundary of the said reserve—in fact, within a few feet of said line; and that the lands outside of the said Pima and Maricopa reservation are open to survey and pre-emption, including the place of seizure."

The deposition of the said Captain Grossman, referred to in the stipulations filed, was agreed in open Court, on the hearing below, to be dispensed with as containing nothing but what was and is of judicial notoriety, "except that the articles" alleged in the information and in the said deposition "mentioned 'as on storage,' shall be for the purposes of this trial considered as *intransitu* only."

It may be added as of public notoriety here, that the lands thus described in the record as "outside of the Pima and Maricopa Reservation" and "including the place of seizure," have been partially surveyed, and are now occupied, cultivated and improved, under the authority of the United States by American and Mexican residents, either citizens or seeking and awaiting citizenship under our laws, that the lands recently proposed to be annexed to the said reservation, alone contain, as appears from authoritative reports made by Congress, twenty-five of these American and Mexican residents, and that the whole valley of the Gila River, including the place of seizure, round it and outside of the reservation, is better settled with permanent residents, excluding indians, than any other rural portion of Arizona. The store of the claimants where the merchandise in controversy was seized, is near the principal highway from Tucson to Fort Yuma; and it is also matter of public notoriety here, that the claimants carry on an active trade, not only with the residents on the Gila river, but also with travelers by the same road.

On the part of the United States, it was alleged upon the hearing of this case, in the Court below—First: That all the Territory of the United States west of the Mississippi River, with little if any exception, is *Indian country*—Second: That no one can lawfully trade therein with an Indian or Indians, without a license from some Indian Superintendent or agent—and, Third: That the claimants, William Bichard & Co., having traded with the Pima and Maricopa Indians without such license, their merchandise seized as above stated and described, is forfeitable and ought to be condemned.

The District Court, after argument upon the record of the case, refused the decree of condemnation prayed for. An appeal was taken from its judgment to this Court, on behalf of the United States. And the errors alleged of the judgment of the Court below on the argument of the appeal, though not formally presented in this Court, were the denial as matters of law of the three propositions above cited, and the omission of that Court to certify that there was *probable cause* for the seizure of the property in controversy.

It has been conceded by all, in every stage of this case, that Congress has power to dispose of and make all needful rules and regulations respecting the territory or other property, and to regulate commerce with the Indian tribes, of the United States. Congress has to a considerable extent exercised both these powers. It is not necessary to inquire whether Congress has exhausted the whole of these two classes of powers in its legislation thereupon. It is quite sufficient for the present case, to determine whether or not it has passed any law, which authorizes us to condemn the property in controversy.

No other class of ordinary federal legislation is so full of pains, penalties and forfeitures as that which regulates trade and intercourse with the Indians—a posteriori, therefore, this Court cannot be too cautious in declaring where and to whom it applies.

Throughout this whole case, the United States has relied on the Congressional act of June 30, 1834 (4 Stats. at Large, 729), especially its first section, as entitling it to a decree for the forfeiture of the property in controversy. That section is as follows: "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas; and also other parts of the United States east of the Mississippi River and not within any State, to which the Indian title has not been extinguished, for the purposes of this act (shall) be taken and deemed to be Indian country." This provision must be regarded as a description, by the highest legislative authority, of what an Indian country is. Its special purpose is declared, as in and by no other, to be "for the purpose of this act" itself, so it says—however, whenever and wherever it applies and extends. This declaration shows the place of operation, of every pain, of every penalty, of every forfeiture, of every license and of every prohibition, which the law authorizes concerning trade and intercourse with Indians. And in this statute, as well as in those since enacted, the limitation *Indian* country, as here declared, is the place and no other, to which all their consequences, whether lenient or severe, are applied.

A brief analysis of this provision, will show us what it comprehends. Its purpose was obviously to declare what an Indian country should thereafter be. The limitation employed is "*to which the Indian title has not been extinguished.*" This was and is the badge of law to show an Indian country to all mankind. The territory then and since which could abide this test, was the Indian country and no other.

Section 2 of the same Act proceeds to apply this test. It is as follows: No person shall be permitted to trade without license with any of the Indians, where?—"in the Indian country." Section 3 allows an Indian Superintendent or Agent to refuse license to a person of bad character, because it would not be proper for him to reside, where?—"in the Indian country." Section 4 forfeits the goods of the man who without license, resides as a trader, or introduces goods, or trades, where?—"in the Indian country. Such is the limitation throughout this whole Act. All its penal consequences are referred to the Indian country.

The same limitation is preserved in later Acts. The Act of June 14, 1858 (11 Stats. at L., 363), authorizes the Marshal to emply a posse comitatus, not exceeding three persons, in any of the States, respectively, to assist in executing process by arresting and bringing in prisoners from the Indian country. The Act of March 15, 1864, Section 1 (13 Stats. at L., 29), makes it penal for any person to sell, exchange, give, barter or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian Superintendent or Agent, or to introduce the same into the Indian country.

Thus by an analysis of our laws regulating trade and intercourse with the Indians, the conclusion is reached that an Indian country as declared by the first section of the Act of 1834, is one "to which the Indian title has not been extinguished;" that there it is that a license is required to enable the citizen to trade with the Indians, and that in the Indian country as thus described, apply the pains, penalties, prohibitions and forfeitures declared by our Acts regulating trade and intercourse with the Indians.

The venerable maxim of legal construction—*expressio unius est exclusio alterius*—which thus ordains that when in a statute one or a few of a class of particulars are enumerated, it must be taken that all the rest of this class not enumerated, are intended to be excluded from its operation, impels to the conclusion that in no other but the Indian country, as described by the Act of 1834, is a license required to enable the citizens to trade with the Indians, and that in no other do the pains, penalties, prohibitions and forfeitures denounced by the laws regulating trade and intercourse with the Indians, apply at all. On this conclusion alone, the condemnation prayed for in this case might be denied. The magnitude of the question involved, however, it is submitted, requires a more exhaustive examination of the law; and by different mode of investigation, of another class of legal provisions, the judicial mind is carried to the same conclusion.

The Act of 1834, already examined, was the consummation of more than forty years of tentative Indian legistion; the Act of 1802, of thirteen years of similar legislation under the Constitution. The Act of March 30, 1802 (2 Stats. at L., 141), provides: "Section 19.—Nothing in that Act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of the individual States." The same provision is found in the Act of July 22, 1790 (1 Stats. at L., 137); in the Act of March 1, 1793 (Sec. 13, 1 Stats. at L., 339), and in the Act of May 19, 1796 (Sec. 19, 1 Stats. at L., 469), which was the last Act on the subject preceding that of 1802, from which the citation under immediate consideration is taken. In reference to this provision, the Act of 1834, thus provides in its repealing clause: Sec. 29.—"That such repeal shall not impair or affect the intercourse Act of 1802, so far as the same relates to or concerns Indian tribes east of the Mississippi river." Why, it may be asked, was this reservation in the Act of 1834, made in favor of States and citizens east of the Mississippi river? It was because they comprised great numbers of citizens on lands of their own or of the United States, settled round Indians, which the Federal Government did not mean should be embarrassed by the monopolies of licenses in their trade with the Indians or with others. The Act of 1834, regulating trade and intercourse with the Indians, can also be traced partly as a consequence to the then recent cases of the American Fur Co. vs. The United States (2 Pet., 358); Cherokee Nation vs. The State of Georgia (5 Pet., 7), and Worcester vs. The State of Georgia (6 Pet., 547)—the last of which was decided in the Supreme Court of the United States, only two years before the passage of the Act of 1834.

At the date of the act of 1834, there were but two organized Territories, Michigan and Florida, east of the Mississipi River. In these, however, as well as on the vast domain west of that river, were increasing communities of citizens on lands of their own or of the United States, round Indian settlements; and it was to prevent these and similar ones, certain to arise from being cramped and embarrassed in their trade and intercourse, that the Indian country was so severely defined and described as already shown by the Act of 1834, which circumscribes it to tefritory in "which the Indian title has not been extinguished."

The protection and improvement of the Indians has been a cherished policy of the United States. Not less so has been the settlement of the public domain by citizens, its organization and development as Territories, and their admission into the Union as States coequal with those already there. The laws regulating trade and intercourse with the Indians are the offspring of both branches of this policy, and any construction of these laws, must be vicious which excludes either branch of this policy from its consideration.

The act of 1834, Sec. 29, we have seen, limited to the States east of the Mississippi river, the Act of 1802, Sec. 19, which allowed free "trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States." The act of 1802, though thus limited, has never been repealed. After the passage of the Act of 1834, the next Territorial establishment was that of Wisconsin, organized April 20, 1836; and the *last* has been that of Wyoming, organized July 26, 1868. In the organic Acts of each of the fifteen Territories established since the Act of 1834, will be found a provision substantially if not literally as follows: "That the constitution and laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory, as elsewhere in the United States." This is the provision on the subject of the organic Act of New Mexico, which with its legislation at the date of our organic Act, was by *its* second section, made applicable to the Territory of Arizona.

Now the only test provided here, in regard to the Constitution and laws of the United States, is their applicability to the Territory of Arizona. The Constitution and laws of the United States, and all parts of them which are applicable to Arizona, have the same force and effect here as elsewhere. Was the 19th Section of the Act of 1802, allowing free trade to citizens of the United States, settled round Indians, limited to the east of the Mississippi by the 29th section of the Act of 1834, applicable to Arizona? If so then it must govern the present case. Still further, the Act of February 27, 1851, (Sec. 7, 9 Stats. at L., 519), is as follows: "All the laws in force, regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be and the same are hereby extended over the Indian tribes in the Territories of New Mexico and Utah." By the act of August 4, 1854 (Sec. 1, 10 Stats. at L., 575), the territory now comprised in Arizona was annexed to New Mexico. The law regulating trade and intercourse with the Indians was therefore the law of Arizona, so far as applicable, for more than eight years prior to its organic Act of February 24, 1863, (12 Stats. at L., 664), and would have so remained after its organization as a Territory without a special provision on the subject.

The question then recurs, is Sec. 19 of the Indian intercourse Act of 1802, allowing free trade with Indians, to citizen settlers round them, in force in this Territory? Mere inspection, it is submitted, shows it to be so applicable, by all the exegencies which made it universal in 1802, and applied it east of the Mississippi river, after 1834. In this Territory, there are settlements of citizens on lands of their own or so to become, unaffected by any Indian title, and round Indians. The store of William Bichard & Co., where the controverted property was seized, is one of them. It cannot be for the benefit of either the Indians or the citizens, under such circumstances, to compel the one class to buy of some monopolist, relieved of all competition by his license, or to compel the others to purchase licenses before they can sell to an Indian or Indians who choose to purchase where they can do so the cheapest or the best.

The conclusion therefore is that William Bichard and Co. required no license to enable them to trade with the Indians outside of any Indian reservation, on land unaffected by Indian title, and that the property controverted in this case, seized as it was on neither, is not forfeitable by reason of their omission so to do.

To prevent misconception, it may not be improper to state some limitations of a few of the foregoing terms and conclusions.

An Indian title is one of mere occupancy, possession or use, subject to the right of preemption in the United States.

An Indian country is a portion of Territory subject to an Indian title, inhabited by Indians. A mere solitude, or a country without Indians, could hardly be considered an Indian coun-

[CONTINUED ON FOURTH PAGE.]